IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Case No. 4:05-cv-00329-GKF-PJC**
	)	
TYSON FOODS, INC., *et al.*,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON PLAINTIFFS' RCRA CLAIM (COUNT 3) (Dkt. No. 2050)

The parties agree that Count 3 is ripe for summary judgment. *See Defendants' Motion for Summary Judgment on Plaintiffs' RCRA Claim*, Dkt. No. 2050 (May 14, 2009) ("RCRA Mot."); *State of Oklahoma's Motion for Partial Summary Judgment and Integrated Brief In Support Thereof*, Dkt. No. 2062, at 38-51 (May 18, 2009) ("Plaintiffs' Summary Judgment Motion"). Because poultry litter is not a RCRA solid waste, because Plaintiffs cannot prove that any single Defendant controls its Contract Growers in the application or sale of poultry litter, and because Plaintiffs cannot prove that bacteria from poultry litter may endanger human health in the IRW, summary judgment is appropriate in Defendants' favor.

I. POULTRY LITTER IS NOT A RCRA-COVERED "SOLID WASTE"

As demonstrated in both Defendants' RCRA Motion and Defendants' brief in response to Plaintiffs' Summary Judgment Motion, RCRA simply does not reach animal manures that are returned to the soil as fertilizers or soil amendments. Plaintiffs' response to Defendants' RCRA Motion, Dkt. No. 2125 (June 2, 2009) ("Opposition" or "Opp."), is largely copied from Plaintiffs' Summary Judgment Motion. As a result, it does not meaningfully address the points in Defendants' RCRA Motion, but rather attacks a series of straw men that bear little resemblance to the arguments Defendants set forth.

First, Plaintiffs argue that analysis of whether poultry litter constitutes a RCRA solid waste should start with the statutory definition of "solid waste." *See* Opp. at 15. Defendants agree, which is why the RCRA Motion begins with the text of the statute. *See* RCRA Mot. at 9-10. The statute requires Plaintiffs to demonstrate that poultry litter is not just the result of "agricultural operations," but rather is "*discarded material* resulting from … agricultural operations." *See* RCRA Mot. at 9-10 (emphasis added). The critical question then, the parties

agree, is the meaning of "discarded." [1]

On that point the parties offer clearly contrasting constructions of the statute. As Defendants' RCRA Motion sets out, in determining whether something has been "discarded," Courts have consistently looked for indicia of its having been "disposed of," "thrown away," or "abandoned." RCRA Mot. at 10. These have included whether the material has a beneficial use, whether it is put to such a use, and whether it has economic value. *Id.* at 11-14. Plaintiffs' only response is a lone footnote claiming that RCRA distinguishes between use of a "new product" and "reuse of a waste." Opp. at 17 n.5. Plaintiffs cite neither legal authority nor other support for this asserted distinction (nor can they) as it has no basis in law. Moreover, it makes no sense. Were a business to take newly manufactured products and simply throw them out the factory's back door, they would be RCRA-covered solid waste as surely as any discarded manufacturing by-product. Conversely, a by-product (or even a previously used product) that is put to a beneficial use is not discarded. Application of RCRA's "solid waste" test does not depend on whether something is "new" but rather on whether it is "discarded." RCRA Mot. at 11-14.

[1] Contrary to Plaintiffs' assertions, Defendants did not argue that RCRA's legislative history alone establishes an "animal manure exception." *See* Opp. at 19-20. Instead, Defendants correctly argued that RCRA's legislative history establishes the same distinction between materials that are discarded and those that are beneficially reused as does RCRA's text. *See* RCRA Mot. at 9-11. Moreover, the legislative history applies this statutory distinction expressly to animal manures that are returned to the soil as fertilizer and conditioner. *Id.* at 11; H.R. Rep. No. 94-1491, 94th Cong., 2d Sess. at 2, *reprinted in* 1976 U.S.C.C.A.N. 6238, 6240 ("Waste itself is a misleading word in the context of the committee's activity. Much industrial and agricultural waste is reclaimed or put to new use and is therefore not a part of the discarded materials disposal problem the committee addresses…. *Agricultural wastes which are returned to the soil as fertilizers or soil conditioners are not considered discarded materials in the sense of this legislation.*") (emphasis added); *Safe Air For Everyone v. Meyer*, 373 F.3d 1035 (9th Cir. 2004) ("In enacting RCRA, Congress also declared that agricultural products that could be recycled or reused as fertilizers were not its concern."). Thus, RCRA's text, legislative history, judicial treatment, administrative enforcement, and enforcement history in Oklahoma all consistently exclude animal manures such as poultry litter from being classified as RCRA solid waste.

Instead of meeting Defendants' discussion, Plaintiffs repeat their view that whether material is "discarded" depends *exclusively* on whether it is reused in a continuous process by the generating industry. *See* Opp. at 16-18. Defendants responded to this argument at length in Tyson Poultry's Opposition to Plaintiffs' Motion for Summary Judgment with Regard to Plaintiffs' Claims under CERCLA and RCRA, Dkt. No. 2184, at 5-9 (June 5, 2009). In summary, neither *United States v. ILCO, Inc.*, 996 F.2d 1126 (11th Cir. 1993), nor *Owen Steel Co. v. Browner*, 37 F.3d 146 (4th Cir. 1994), relied exclusively on whether material had changed industries. *See ILCO*, 996 F.2d at 1132 (concluding that the lead plates in question had been disposed of prior to being recycled into another industry); *Owen Steel*, 37 F.3d at 148-50 (similarly looking at the length of time between creation and reuse of the slag in determining it to have been discarded).[2] Moreover, Plaintiffs' argument misconstrues case law from the D.C. Circuit, which has subsequently made clear that Plaintiffs' argument is wrong because "material destined for recycling in another industry is [not] necessarily 'discarded.'" *Safe Food & Fertilizer v. EPA*, 350 F.3d 1263, 1268 (D.C. Cir. 2003);[3] *see Am. Mining Cong. v. EPA*, 824

[2] The discussion in *Safe Air*, 373 F.3d 1035, is dicta as there was no question in that case whether the grass remnants at issue were being reused as part of the same process. But in any event, poultry litter *is* reused within the same agricultural industry that creates it. Numerous poultry growers testified that they contract with Defendants specifically in order to obtain access to poultry litter, which they use to reclaim poor quality land and/or grow crops to support their cattle operations. *See* RCRA Motion at 17-18 (citing sources). Plaintiffs now concede that access to poultry litter is an inducement to farmers to become Growers. *See* Opp. ¶16. These agricultural activities coexist symbiotically, and litter is often reused, as Plaintiffs observe, on the very farms where it is produced. Poultry litter also provides Growers with a valuable resource that they can sell or barter, thereby increasing the profitability of their operation. *See id.*

[3] Plaintiffs' effort to distinguish *Safe Foods* as regarding the reuse of materials that were identical to the virgin materials, *see* Opp. at 18 n.7, is wrong and misleading. First, the materials in question were not identical. As the D.C. Circuit noted, the EPA "had set metal contaminant limits higher--sometimes considerably higher--than the highest level found in the twenty virgin commercial fertilizer samples it used as its benchmark." *Safe Foods*, 350 F.3d at 1269. The D.C. Circuit held the differences to be "substantively meaningless" not as a function of their chemical makeup, as Plaintiffs represent, but as a function of potential "health and

F.2d 1177, 1186-90 (D.C. Cir. 1987) (holding only that materials "destined for beneficial reuse or recycling in a continuous process by the generating industry itself" are not RCRA solid waste, not that materials destined for use in a different industry are necessarily solid waste). Quite the contrary, in *Safe Foods*, the D.C. Circuit held that fertilizers made with zinc recycled from other industries are not RCRA solid waste. 350 F.3d 1263, 1268.

Plaintiffs' proposed single-factor rule sweeps too broadly and provides no basis for distinguishing materials actually disposed of from those beneficially reused. *See* Dkt. No. 2184 at 7-8. Unsurprisingly, then, EPA has agreed with the view set out in *Safe Foods* and in Defendants' RCRA Motion, that whether materials are "discarded" requires an analysis of the specific materials, their value, and their intended and actual use, not merely whether they change production processes. *Id.* at 8. As both parties agree, EPA's view merits substantial deference, *see id.*[4]

Second, Plaintiffs offer no substantive response to EPA's long and consistent record of excluding land-applied animal manures from RCRA enforcement. Instead, their answer is to claim that EPA's enforcement conduct proceeds from some narrower "regulatory definition of solid waste." Opp. at 15. But Plaintiffs' once again confuse EPA's treatment of "solid waste" under RCRA with its treatment of "hazardous waste" under EPA's entirely separate set of regulations for hazardous materials. The regulatory definition Plaintiffs invoke is identified in the case they cite, *Connecticut Coastal Fishermen's Association v. Remington Arms Co.*, 989

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environmental risks." *Id.* at 1270. Second, while *Safe Foods* (as do many RCRA cases) regards the reasonableness of EPA's conduct, the case still arose under RCRA, not under some separate regulatory scheme. Plaintiffs' proposed distinction lacks meaning.

[4] Plaintiffs' argument regarding the burden of proof is misplaced. *See* Opp. at 19-20. In order to prove that a defendant has violated RCRA, the plaintiff must prove that the material in question is a RCRA-covered solid waste, which includes proving that it has been "discarded. *See* 42 U.S.C. § 6903(27). Plaintiffs' effort to shift this burden to Defendants should be rejected. *See Sierra Club v. Seaboard Farms*, 387 F.3d 1167, 1169 (10th Cir. 2004).

F.2d 1305, 1314-15 (2d Cir. 1993). There, the Second Circuit explained that

> [t]he EPA distinguishes between RCRA's regulatory and remedial purposes and offers a different definition of solid waste depending upon the statutory context in which the term appears. In its *amicus* brief, the EPA tells us that the regulatory definition of solid waste—found at 40 C.F.R. § 261.2(a)—is narrower than its statutory counterpart…. According to RCRA regulations, this definition of solid waste "applies only to wastes that also are hazardous for purposes of the regulations implementing Subtitle C of RCRA." 40 C.F.R. § 261.1(b)(1).

In other words, EPA applies a different definition of "solid waste" for materials that are both "solid" and "hazardous." In this litigation Plaintiffs have repeatedly conflated the two. But because Plaintiffs have waived any claim that this case involves RCRA hazardous waste, Defendants readily agree that this narrower definition has no bearing on this case.[5] For that reason, Plaintiffs are unable to provide any citation to an instance where Defendants allegedly relied upon the definition of "solid waste" that is contained in the inapplicable "hazardous waste" regulations. *See* Opp. at 15. Additionally, Plaintiffs fail to demonstrate where any of the numerous EPA authorities gathered in Defendants' RCRA Motion applies or follows from the improper "hazardous waste" regulatory definition. *Compare* RCRA Mot. at 14-17, *with* Opp. at 15. Instead, Defendants' authorities uniformly regard RCRA "solid waste" and proceed from the proper definition at issue in this case. As those authorities, make clear, EPA has consistently declined to apply RCRA's "solid waste" regime to land-applied animal manures.[6]

Third, Plaintiffs have failed to identify any dispute of material fact regarding the use and

[5] Defendants so noted in their RCRA Motion, *see* RCRA Mot. at 9 n.1, and Plaintiffs have made no argument to the contrary. Summary judgment is appropriate as to this issue.

[6] Plaintiffs' only other argument is to claim that EPA reversed its long-standing position that RCRA does not reach beneficially reused animal manures in the *Seaboard Foods* case. *See* Opp. at 19. Defendants rebutted this incorrect argument at length in their response to Plaintiffs' Motion for Summary Judgment. *See* Dkt. No. 2184, at 9-11.

treatment of poultry litter in the IRW.[7] They admit that poultry litter is a fertilizer, disputing only its effectiveness. *Compare* RCRA Mot. ¶¶5-6, 12, *with* Opp. ¶¶5-6, 12. They fully admit that "[a]ccess to and use of poultry litter is an inducement for farmers and ranchers to raise poultry." *Id.* ¶ 16. This admission is significant because the fact that poultry litter has sufficient value to induce a farmer to enter the poultry-growing business demonstrates that the farmer is not simply throwing the litter away when he uses it on his land. Plaintiffs have developed no testimony showing that farmers and ranchers in the IRW throw poultry litter away simply to be rid of it; rather the record is uncontroverted that farmers and ranchers intend to buy, sell, and use poultry litter as a fertilizer and/or soil conditioner. *Compare* RCRA Mot. ¶¶12-13, *with* Opp. ¶¶12-13. It is therefore unremarkable that no Oklahoma official has ever treated the use of poultry litter in the IRW as a RCRA solid waste. *See* RCRA Mot. at 18-19. Because poultry litter is not discarded, but is beneficially used as a valuable commodity, it is not "discarded" and is therefore not "solid waste" under RCRA. Summary judgment is appropriate.

II. DEFENDANTS DO NOT "CONTRIBUTE TO" THE HANDLING OR DISPOSAL OF POULTRY LITTER IN THE IRW[8]

Courts have consistently required a showing of both factual and proximate causation for RCRA liability, demonstrating that defendants either conducted the challenged activity itself, or controlled the party that did so in the execution of the objected-to conduct. *See* RCRA Mot. at 20 (citing authorities). Plaintiffs' assertion to the contrary, *see* Opp. at 20, is undercut by the very authorities they cite. In *United States v. Aceto Agricultural Chemicals Corporation*, 872

[7] Plaintiffs offer only partial or non-responses to many of Defendants' demonstrated undisputed facts. To the extent a fact or any part of a fact is not specifically controverted, it is admitted for purposes of summary judgment. LCvR 56.1(c) ("All material facts set forth in the statement of the material facts of the movant shall be deemed admitted for the purpose of summary judgment unless specifically controverted by the statement of material facts of the opposing party.").

[8] A RCRA citizen suit may reach the "handling, storage, treatment, transportation, or disposal" of a solid waste. Plaintiffs now limit Count 3 to "handling or disposal." Opp. at 20.

F.2d 1373 (8th Cir. 1989), the court did not hold that control is unnecessary. Rather, it held that control in that case could be inferred from the record. *Id.* at 1383. Thus, control *is* required.[9]

Plaintiffs assert that they need demonstrate only that Defendants "have a part or share in producing an effect" relating to the application or sale of poultry litter. Opp. at 21 (citing *Cox v. City of Dallas*, 256 F.3d 281 (5th Cir. 2001)). First, *Cox* is only marginally relevant to the legal dispute in this case as on the facts in that case there was no question of control. *Cox* regarded two dumps, the first of which the City had improperly permitted to operate as an illegal dump, and the second of which the City had itself used improperly, *Cox*, 256 F.3d at 286-87. Second, the rule Plaintiffs would extract from *Cox* would swallow entire industries. For example, for obvious reasons (reliability; low shipping costs; etc.) auto parts suppliers may chose to locate themselves near automobile manufacturing plants. And, such suppliers have very few prospective purchasers for their car parts. On these bases, Defendants would have each car manufacturer be responsible for the disposal practices of each of their suppliers. *See* Opp. at 22-23 (arguing that Defendants' business model creates RCRA liability). So too might any other company in any other supply chain arguably have "a part or share in producing an effect" related to alleged solid waste disposal. This construction eviscerates the corporate forms and is plainly overbroad.

Plaintiffs fail to identify any specific evidence of any Defendant actually directing the use, sale, or application of poultry litter. *See* RCRA Mot. ¶¶17-22; Opp. ¶¶17-22. Apart from noting that a few Defendants have on occasion recommended that growers "cake-out" on a

[9] The other case Plaintiffs cite, *United States v. Valentine*, 885 F. Supp. 1506 (D. Wyo. 1995), concerned direct, not vicarious, liability. *See* Opp. at 20. There, a trucking company sought to escape liability where it did not control the ultimate disposal decisions. The court observed that a party need not "have control over the ultimate decisions concerning waste disposal" in order to be a RCRA contributor. *Id.* at 1512. Because RCRA also reaches the handling, treatment, and transportation of solid waste, the defendant was liable for its own transportation. *Id.*

particular schedule (which pertains to the health of the birds, not the application of poultry litter), *see* Opp. ¶19, and with the exception of a handful of company-owned farms, Plaintiffs have not come forward with a scintilla of evidence proving that any Defendant controlled any Growers' use, sale, or application of poultry litter in the IRW. In fact, far from proving any coercion on Defendants' part, Plaintiffs now admit that Growers want poultry litter, and agree to raise poultry specifically to get it. *See* Opp. ¶16; *id.* at 23.

Instead, Plaintiffs now base their "contributing to" case on Defendants' alleged "influence" over the use, sale, or application of poultry litter. *See* Opp. at 22-23; *id.* ¶¶17-22.[10] But this could be alleged of any business in any supply chain and is legally insufficient. As Courts have recognized in the analogous context of RCRA "arranger" liability, a party is not liable where it could have, but did not, exercise control. *See Gen. Elec. Co. v. AAMCO Transmissions Inc.*, 962 F.2d 281, 286 (2d Cir. 1992). Indeed, "the mere existence of economic bargaining power which would permit one party to impose certain terms and conditions on another, does not itself *create* an obligation" and the "mere ability or opportunity to control [waste] disposal" is insufficient to create liability. *Id.* at 286-87; *see also Geraghty & Miller, Inc. v. Conoco Inc.*, 234 F.3d 917, 929 (5th Cir. 2000) (liability attaches to "the *obligation* to exercise control over hazardous waste disposal, and not the mere ability or opportunity to control the disposal"); *Concrete Sales & Servs, Inc. v. Blue Bird Body Co.*, 211 F.3d 1333, 1337 (11th Cir. 2000) (existence of substantial economic leverage insufficient to establish "arranger" liability absent evidence that the defendant had actually "used financial leverage to even attempt to control or direct … disposal practices"). Absent some showing of actual control by each

[10] Plaintiffs assert that the implementation of the *City of Tulsa* settlement proves Defendants' ability to control Growers' use of poultry litter. *See, e.g.*, Opp. at 23 n.12. But the *only* record evidence on this point is that the Eucha-Spavinaw Watershed Growers' acquiescence in that settlement was voluntary. *See* P.I.T. at 1355:8-1356:4 (Testimony of Patrick Pilkington).

individual Defendant, Plaintiffs allegations of potential "influence" are legally insufficient.

III. POULTRY LITTER DOES NOT POSE AN IMMINENT AND SUBSTANTIAL ENDANGERMENT TO HEALTH IN THE IRW

Plaintiffs' Opposition makes clear just how speculative their claim of a potential endangerment to health in the IRW under RCRA is. While they assert that various agencies have concluded that bacteria from poultry enter some waters in the IRW, none of the sources cited supports the proposition that pathogenic bacteria from poultry litter endanger human health in the IRW, as Plaintiffs assert. *See* Opp. at 24; *id.* ¶29. Rather, these materials merely state that poultry litter, among many other sources, contains bacteria, and that surface waters in the IRW contain bacteria. But they do little more to link the two. In fact, quite the contrary, the USDA report Plaintiffs cite notes that bacteria problems persist in the Eucha-Spavinaw Watershed despite the *City of Tulsa* settlement. *See* Opp. Ex. 74 at A-5. Actually linking bacteria in IRW waters to poultry litter fell to Dr. Harwood's biomarker.

The evidence Plaintiffs' put forward is no different than the evidence this Court previously found insufficient. In order to demonstrate a health risk, Plaintiffs continue to rely principally on the indicator bacteria approach, despite the fact that EPA has suggested publicly that it is neither "up-to-date" nor "scientifically-defensible," and has initiated a process to revise it. *See* RCRA Mot. at 24. Indeed, Plaintiffs now declare this method to be "highly predictive of the presence of pathogens," Opp. ¶30, without even acknowledging that it was demonstrated only as to waters impacted with human (not animal) feces. *See* RCRA Mot. at 24; *id.* ¶31. As to Plaintiffs' claims of disease in the IRW, every Oklahoma agency with responsibility for public health has disclaimed any health risk from poultry-related bacteria in the IRW. *Id.* at 24-25.[11]

[11] *See also* Ex. 1 (Parish 1/14/08 Dep.) at 212:16-214:6 (ODAFF has made no finding that land application of poultry litter presents an imminent and substantial risk of harm to human health or the environment, or that land application should be stopped in the IRW).

Plaintiffs finally acknowledge that they cannot identify a single person sickened by exposure to poultry litter, but claim that "the epidemiological evidence" shows that a significant number of unknown people must have become ill. *Id.* at ¶36. It is unclear to precisely what data they refer, given that Oklahoma's own former chief health officer explained that the State (nor anyone else, for that matter) has never conducted an epidemiological investigation in the IRW to investigate incidents of diseases such as salmonelliosis or campylobacteriosis. *See, e.g.*, Ex. 2 (Crutcher 12/20/07 Dep.) at 83:9-17, 97:3-10. Indeed, the State has never even seen disease levels in the IRW to justify any inquiry of that nature. *Id.* at 73:13-74:17, 111:8-114:5.[12] And, Plaintiffs' county-level disease figures say nothing about the cause of the illness or source of the disease-causing organism (*i.e.* foodborne vs. waterborne; cattle vs. swine).[13] What is relevant, however, is that, disease rates statewide do not correlate to poultry farming (and use of poultry litter). *See* RCRA Mot. Ex. 34.

Finally, with regard to disinfection byproducts ("DBPs"), the fact that Dr. Cooke discussed DBPs during his deposition hardly qualifies him as an expert as to human health effects. Plaintiffs cite to no opinions disclosed in his Rule 26 expert report, nor demonstrate that he has the appropriate qualifications to so testify. *See* Opp. at 25 (citing only deposition testimony). Dr. Cooke is a lake limnologist, not a medical doctor or water quality expert. Plaintiffs' only testimony regarding the alleged health effects of DBPs from a properly disclosed expert came from Dr. Teaf. Defendants have challenged Dr. Teaf's testimony under *Daubert*. Dkt #2067. If that motion is granted, Plaintiffs' DBP claims must go.

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[12] Declarations adopting Dr. Banner's and Dr. Clay's opinions are attached. *See* Exs. 3 & 4.

[13] Plaintiffs' efforts to explain away the lack of sick people in the IRW has been a work in progress. For example, contrast the bases provided in Dr. Teaf's declaration regarding visitors to the IRW, *see* Opp. Ex. 82 ¶¶14-15, with the lack of bases provided at his deposition, *see* Ex. 5 (Teaf 7/31/08 Depo.) at 439:5-450:14.

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I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

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___/s/ *Jay T. Jorgensen*_____